IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 49 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SARA SERVICES & ENGINEERS PVT.LTD.

Versus

O.N.G.C. (CHIEF MANAGER)(MM)- ACTG

Appearance:

1. PETN,UNDER ARBITRATION ACT. No. 49 of 2001
MR PARESH M DAVE for Petitioner No. 1
MR AJAY R MEHTA for Respondent No. 1
NOTICE SERVED for Respondent No. 2-3

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 05/07/2002

ORAL JUDGEMENT

1. The present petitioner is preferred under sec. 11 of the Arbitration and Conciliation Act, 1996 for the appointment of Sole Arbitrator to get the disputes and differences resolved between the parties as regards the contract between them embodied in the Supply Order dated 27.5.1996. It is contended that there is an agreement in the order between the parties that in case of dispute, difference or any question of disagreement, such disputes shall be referred to the Sole Arbitrator as per the

condition no. 16 of the Agreement.

This petition has been resisted by respondent-ONGC and it is submitted that the alleged claim of the petitioner is absolutely time barred and for time barred clainms or request to refer the dispute to Arbitrator, no Arbitrator can be appointed and should be appointed by the Court exercising the jurisdiction under sec. 11 of the Act. It is the say of the respondent-ONGC that the supply Order awarded to the petitioner was of 17.5.1996 and the said contract came to be terminated by ONGC on 22.12.1997. Final payment under the Supply Order has been made by the ONGC on 1.12.1997. So, all these dates are relevant and the filing of the petition on 16.4.2001 woud be absolutely time barred. Petitioner should have lodged the claim within three years from either on 1.12.1997 or 22.12.1997, the date on which the contract came to be cancelled. It is argued that the relevant Article would be Article no. 74 under Part-II of the Schedule to the Limitation Act, 1963 and suit based on the contract in question could have been instituted within three years from the date of the termination/conclusion of the contract.

3. Firstly, learned counsel for the petitioner Mr Dave has resisted the submission and argued that as per the ratio of the decision of the Apex Court while dealing with the petitioner under sec. 11 of the Act, such an issue is not required to be dealt with by this Court and in view of the provisions of sec. 16 of the Act, all the relevant issues shall have to be left to the Arbitrator. The Chief Justice or his designate/Nominee exercising the jurisdiction/powers under sec. 11 is exercising only administrative powers and it is not a judicial forum which can decide or undertake to decide the legal issue. Mr. Dave has placed reliance on the decision reported in (1999)8 SCC p. 572 (Sunderam Finance Ltd. vs. NEPC India Ltd.): AIR 1999 SC 3246.

4.(a) Mr. Ajay Mehta learned counsel appearing for the respondent-ONGC has rightly argued that while exercising the jurisdiction under sec. 11 the Chief Justice or the Nominees has to consider whether the claim would be within time, prima-facie, and if the claim is absolutely time barred, otherwise, the dispute is not found referable , the application moved under sec. 11 of the Act can be rejected. This aspect has been considered by this court, of course, from different angle, while dealing with the Petition Under Arbitration Act No. 10, 11, 14 and 15 of 2001 where this Court rejected the petitions as the Court found that the petitions u/s. 11

of the Act for the appointment of Arbitrator are moved beyond the agreed period of limitation of 90 days holding that as the petitions moved beyond the period of limitation cannot be entertained.

4.(b) Mr. Mehta has also cited one decision of the Apex Court reported in (1997)10 SCC 528 where the Apex Court has observed that in view of the provisions in the Arbitration clause, the liability to appoint Arbitrator ceases if no claim of contractor is received within 90 days of receipt by the contractor of an intimation that the bill is ready for payment. This clause operates to decide the liability of the appointment on the expiry of 90 days as set out therein. It is not merely a clause providing the period of limitation. The Contractor has to make a claim within 90 days even for the amount received in the final bill. This clause operates to dischage the liability. The Apex Court allowing the appeal held that the High Court was not right in referring the alleged dispute to the Arbitrator.

4(c). Other decision of the Apex Court reported in AIR 1992 SC p. 1918 is also placed to the notice of this Court where the Court has held that in case of time barred claims there is no right to apply nor the Court is bound to refer the dispute u/s. 20 of the Act (i.e. old Act of 1940).

5. The point agitated before this Court is in two different shades. According to the learned counsel for the petitioner, the present petition is preferred very well within time and the claim which requires to be referred to the Arbitrator is also not a time barred. Referring to the decision of the Apex Court in the case of Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority, reported in AIR 1988 SC 1007, it is argued that Article 137 of the Limitation Act would apply in this type of claims and disputes. The facts of the cited decision are mostly similar to the present case. I would like to quoe the relevant part of the decision from para-4 of the decision where the Apex Court has observed that :

> "A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under S. 8 or a reference under S. 20 of the Act. See Law of Arbitration by R.S. Bachawat, 1st Edition, page 354. There should be dispute and there can only be a dispute

when a claim is asserted by one party and denied by the other on whatever grounds. Mere failaure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying, not merely inaction to accede to a claim or a request."

In the cited decision, The Delhi Development Authority had accepted the tender of the appellant for the construction and the work was commenced on 15.10.1976. It was required to be completed on 14.7.1977. Ultimately, the period was extended and the work was finally completed on 22.4.1980. Between February, 1983 to december, 1985 the appellant sent several letters to the respondents requesting them to finalise the bill. The first of such letter was written on 28.2.1983 and the final letter was written onn 4th September, 1985 requesting the respondents to finalise the bill and ultimately served with notice through the counsel to refer the dispute to the Arbitrator. Ultimately, in the month of January, 1996, the petition under sec. 20 of the Arbitration Act was filed seeking appropriate directions from the Court.

It is contended by the petitioner that several letters were written by the petitioner to the respondent-corporation and the corporation submits that it was unilateral correspondence and one of such letter even is not received by ONGC. The Statutory notice (i.e. demand) has been served by the petitioner to refer the dispute to the Arbitrator is dated 12.2.1999. However, the ONGC has denied the receipt of this letter-cum-notice. The subsequent notice served to ONGC is dated 12.6.2000 i.e. within three years from the date of termination of the contract.

This notice is not responded by the respondent-ONGC.

It is not a matter of dispute that the notice dated 12.6.2000 has not been responded by the respondent-ONGC and the contention remained unresisted. Without making any detailed comments on the arguments advanced as to whether the claim of the petitioner is time barred or not, at least it can be observed, in view of the ratio of the above referred decisions of the Apex Court that Article No. 137 under Part II of Schedule to the Limitation Act may apply. When an issue is raised whether the dispute is referable to the Arbitrator or

not, or even after three years from the date of service of statutory notice provided under the Act, whether one has a right to apply under sec. 11 of the Act or not, it has to be seen that the claim is not absolutely time barred. In the present case, within three years, the statutory notice has been served to ONGC and before expiry of the period of limitation provided under Article No. 137, this petition under sec. 11 of the Act has been preferred on 12.6.2000. So, in view of the above referred two decisions and especially the decision in the case of the Major (Retd.) Inder Singh (supra) this is not case where the petition can be rejected holding that the same is prima-facie not entertainable as it is advocating a time barred claim.. The Arbitrator also can decide the issue of limitation whether the claim of the petitioner is within time or barred by limitation. This issue is left open.

So, this petition requires to be allowed and, therefore, the same is allowed. The disputes raised by the petitioner in this petition is ordered to be referred to the Sole Arbitrator as per clause 16 of the Agreement between the parties. It will be open for the either party to pray before the Sole Arbitrator that the point of limitation be heard and decided as preliminary issue.

Mr. Ajay Mehta learned counsel appearing for the ONGC has suggested the name of Mr. Justice A.P. Ravani, retired Chief Justice, Rajsthan High Court to be appointed as Sole Arbitrator to deal with the dispute and to pass appropriate reasoned award. Mr. Dave has also shown his agreement to the proposal. So, Mr. Justice A.P. Ravani, retired Chief Justice, Rajsthan High Court is hereby appointed as Sole Arbitrator. Sole Arbitrator is also authorised to act on ordinary copies of the minutes and documents authenticated by the advocate for the parties.

The present petition stands disposed of accordingly.

(C.K. BUCH, J.)
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